Supreme Court, U.S.
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No. 88-980 (2)

# In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK R. ECKLES,
dba Riverview Marina,

Appellant,

v.

STATE OF OREGON, ANTHONY MEEKER,
Treasurer of State of Oregon, and
OREGON DEPARTMENT OF REVENUE,
and its Director, Richard Munn,

Appellees.

## APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

## MOTION TO AFFIRM OR DISMISS

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## MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16.1(b) and (d), appellees State of Oregon, et al., move to dismiss this appeal or to affirm summarily the judgment and opinion of the Oregon Supreme Court in *Eckles v. State of Oregon*, 306 Or. 380, 760 P.2d 846 (1988). This Court should affirm or dismiss because the case does not merit the Court's plenary review.

## ARGUMENT

The Oregon Supreme Court reached a result in this case that gives appellant (Eckles) all that he is entitled to under federal principles, and perhaps more. The court concluded that the state legislature, in violation of the Oregon Constitution, impaired the obligation of a contract when it by law authorized a transfer of money from a statutorily dedicated fund. In directing the actual transfer, the legislature also breached the contract. Under the federal constitution, the amendments may not constitute an impairment at all. Even if they do, however, the Oregon court's analysis of the breach and what follows from it is the same under the federal constitution.

This controversy, ultimately, does not present a federal question of sufficient significance or broad importance to merit plenary review. The resolution of the case depends on the application of settled principles to the particular and probably unique facts of this case. Also, the Oregon court's decision does not threaten private citizens, or even Eckles, with possible irremediable harm. Under the Oregon Supreme Court's holding, individuals who believe they have been injured by the legislature's action may attempt to pursue a contract action for damages, and in fact many have done so. Eckles' assertions to this Court suggesting he is without a remedy involve state law questions that could have been considered and resolved had Eckles pursued relief in state court. This Court's further review is not warranted where, as here, Eckles has bypassed the state court procedures that

would have afforded him whatever relief he is entitled to receive.

## I. BACKGROUND.

Eckles' description of the nature of this case and the Oregon Supreme Court's decision below is incomplete and, in some respects, inaccurate. We therefore begin with a description of the legislative action challenged in this case, the nature of the lawsuit Eckles brought and the relief he sought, and the Oregon Supreme Court's decision.

### A. The nature of the Industrial Accident Fund.

In Oregon, most private and public employers must participate in the workers' compensation program, which provides benefits for employees injured in connection with their work. Employers required to participate must insure against workers' claims in one of three ways: by self-insuring; by purchasing insurance from a private insurance company; or by purchasing insurance from the State Accident Insurance Fund (SAIF), a public corporation and state instrumentality that sells workers' compensation insurance on a competitive basis to Oregon employers. *See*, Or. Rev. Stat. §§ 656.017(1) (1987), 656.751(1) (1987), 656.752 (1987). In his brief to this Court, Eckles sometimes speaks in sweeping terms of the injuries to the interests of insured employers. (*See, e.g.*, Jur. St. at 7-10). Not all Oregon employers have an interest in this litigation, however. Only those that have chosen to purchase their insurance from SAIF even arguably are affected by the legislative actions at issue.

For many years, SAIF's operations have been self-funded. Funds received by SAIF in the form of insurance premiums and interest on investments become part of the Industrial Accident Fund (the Fund), which in turn is the source of money for workers' compensation claims paid by SAIF. In managing the Fund, SAIF first must determine the amount of any liabilities it owes. Or. Rev. Stat. § 656.526(1) (1987). Next, it must determine the amount of reserves

"deemed actuarially necessary according to recognized insurance principles." Or. Rev. Stat. § 656.526(2) (1987). To the extent the Fund exceeds these amounts, the excess is considered surplus.

Prior to the legislative amendments at issue in this case, the legislature dedicated the Fund to the uses and purposes declared in the workers' compensation scheme and disclaimed "any proprietary interest" in the Fund or in state contributions to it. *See* Or. Rev. Stat. § 656.634 (amended effective Sept. 9, 1982). As to any surplus, the legislature provided that SAIF "in its discretion may . . . declare a dividend to be paid to, or credited to the accounts of, employers who were insured by [SAIF] during all or part of the period for which the dividend is declared." Or. Rev. Stat. § 656.526(2) (1987). Significantly, SAIF was expressly prohibited from promising any employer in advance that it would declare a dividend out of surplus amounts in the Fund. *Ibid.*

Although Eckles throughout his brief attempts to liken SAIF to a mutual insurance company, the analogy is seriously wrong. Under the terms of the contract between SAIF and the employers that purchase insurance from it, employers pay a premium in exchange for workers' compensation coverage for a specified time period. Insured employers do not control and regulate SAIF's affairs, they do not own stock or shares in SAIF, and they do not share in SAIF's profits except to the extent that SAIF, in its absolute discretion, chooses to declare a dividend out of surplus in the Fund. SAIF is purely an instrumentality of the state, in which policyholders have no ownership or management interest. *See State ex rel. Eckles v. Livermore*, 72 Or. App. 650, 658-61, 696 P.2d 1153, 1158-61 (1985) *aff'd*, 302 Or. 37, 726 P.2d 918 (1986).

**B. The 1982 amendments.**

In September of 1982, a special session of the Oregon Legislative Assembly convened to attempt to address a serious state budget deficit. At the conclusion of the special session,

the Legislative Assembly passed an act that, *inter alia*, directed the State Treasurer to transfer $81 million from the Industrial Accident Fund to the state's General Fund. 1982 Or. Laws Spec. Sess. 3, ch. 2 (Appendix).[1] The legislature accomplished the transfer through essentially two provisions. Section two of the Act directed the State Treasurer, notwithstanding any provision of law to the contrary, to transfer $81 million from surplus revenues in the Industrial Accident Fund to the state General Fund. *Id.* § 2(2). Section four of the Act amended Or. Rev. Stat. § 656.634(2) to provide that the state has the right legislatively to direct the disposition of any surplus in excess of reserves deemed actuarially necessary for SAIF to meet its obligations as an insurer and to assure its continued fiscal soundness. *Id.* § 4(2). The Act took effect upon passage pursuant to the legislature's declaration that it was necessary for the immediate preservation of the public peace, health and safety. *Id.* § 5.

As part of the Act, the Oregon Legislative Assembly made exhaustive findings on the nature and status of the Fund. In particular, the legislature found that SAIF and the Fund possessed all reserves necessary under accepted insurance practices to guarantee payment of all of SAIF's liabilities and to ensure its efficient operation and management. *Id.* § 1(3).

The legislature further found that the Fund contained $168 million over and above the amounts needed to protect the interests of employers and injured workers, and that the surplus in excess of prudent reserves would exceed $200 million by the end of 1982. *Ibid.* Most of the "excess surplus" had accumulated between 1979 and 1982, almost entirely as a result of income from and appreciation of investments. *Id.* at § 1(5), (6). Premiums charged employers during this period

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[1] The entire text of the Act is appended to this motion.

were competitive with rates charged by competitor insurance companies and could not have been lowered significantly. *Id.* at § 1(6).

Finally, the legislature observed that SAIF had statutory discretion to declare dividends and to pay them to employers out of surplus in the Fund; that by law no employer could be promised dividend payments in advance; and that dividends for calendar years 1981 and 1982 had already been declared and paid. *Id.* § 1(4). The legislature therefore ordered the reduction in surplus after concluding that it was contrary to the public interest for SAIF to maintain a surplus so far in excess of the amount needed for its statutory purposes, that the transfer would assist in maintaining the state's fiscal integrity, and that the legislature's action would not impair SAIF's ability to meet its statutory obligations. *Id.* § 1(8), (10), (11). None of the Legislative Assembly's findings have been challenged or questioned in this litigation.

**C. Eckles' lawsuit and the Oregon Supreme Court's decision.**

Eckles, an employer insured by SAIF, brought this lawsuit with the objective of forcing the state to return the transferred moneys to the Fund. His complaint raised seventeen claims against the state and various named state officials.

Eckles asserted, among other claims,[2] that the 1982 amendments violated the state and federal constitutional prohibitions against impairment of contracts; that SAIF's very creation violated the Oregon constitution; that the transfer deprived employers insured by SAIF of property without due process of law; that the transfer was a taking of property in

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[2] Eckles' other claims were directed primarily to chapter three of the Act. It declares a tax on SAIF's excess surplus if the transfer of funds is invalidated. The Oregon Supreme Court declined to decide the validity of the tax provision given its resolution of the case. 306 Or. at 382, n.3, 760 P.2d at 848-49, n.3.

violation of the takings clauses of the state and federal constitutions; and that the transfer violated the equal protection and equal privileges and immunities clauses of the state and federal constitutions. Significantly, Eckles did not allege a breach of contract, nor did he seek damages. His complaint sought primarily declaratory relief and injunctive relief, asking that the transfer be held "null, void and unconstitutional," and that the court order the return of the $81 million plus interest to the Fund.

The Oregon Supreme Court agreed with Eckles that state statutes formed part of the contract between SAIF and its employers. Specifically, the state court held that the former terms of Or. Rev. Stat. § 656.634(2) "expressed a contractual promise of the state to employers who insured with SAIF that the state would not transfer IAF funds to the General Fund." *Eckles v. State of Oregon*, 306 Or. at 393, 760 P.2d at 855. The question then was whether the amendments to the statutes which changed this contractual promise (section four) and brought about a transfer of funds (section two) impaired the contract within the meaning of either the state or federal constitutions.

The Oregon Supreme Court's answer was yes as to section four and no as to section two. The court first considered the question under Article I, section 21, of the Oregon Constitution, which prohibits the state from passing laws impairing contracts. The court distinguished a law that impairs a contract by altering the legal rights and responsibilities the contract creates from one that simply leads to a breach. It concluded that section four of the Transfer Act in fact impaired SAIF's contracts with insured employers because it extinguished the state's contractual promise not to take money from the Industrial Accident Fund. The court reasoned:

> Section four of the Transfer Act impairs the obligation of the contract formerly stated in ORS 656.634 because section four would eliminate that obligation with respect to surplus [Industrial Accident Funds]. The state could use surplus IAF funds for any purpose that it chose, without contractual liability to employers insured by SAIF. Section four, then, violates Article I, section 21, of the Oregon Constitution insofar as it affects employers with SAIF insurance contracts entered into before the enactment of the Transfer Act. As to subsequent contracts, including renewals of contracts then in existence, section four is valid because ORS 656.634 as amended by section four would define, not impair, the state's contractual obligations to employers by reason of those contracts.

306 Or. at 399, 760 P.2d at 858 (footnote omitted).

The court reached the opposite conclusion with respect to section two, which it held to be severable from section four. 306 Or. at 400, n.19, 760 P.2d at 858, n.19. Section two directed the State Treasurer to transfer the $81 million to the General Fund, notwithstanding any laws to the contrary. Standing alone, section two did not relieve the state of its contractual promise not to appropriate money in the Fund for other purposes. It instead mandated a breach of the promise. The Oregon Supreme Court therefore concluded that section two of the Act did not impair the contract created by statute:

> By directing the State Treasurer to transfer $81 million from the [Industrial Accident Fund] to the General Fund, section two of the Transfer Act breached the state's contract with employers insured with SAIF. Unlike section four of the Act, however, section two does not alter retroactively the terms of that contract. Though the transfer breached the state's contract, the obligation of that contract remains. That obligation is to compensate employers for the breach. . . . Section two, then, does not impair the obligation of the state's contract and does not violate Article I, section 21, of the Oregon Constitution.

306 Or. at 402, 760 P.2d at 860. The court also rejected Eckles' federal claim that section two impaired the obligation of his contract, reasoning that the analysis was the same. 306 Or. at 403, 760 P.2d at 860-61.

The court recognized that insured employers may have a claim for damages based on the state's breach. However, it declined to decide in this proceeding whether Eckles' contractual interests in fact were harmed by the transfer, or to attempt to determine the measure of his damages. Eckles' complaint did not include a claim for breach of contract, he had not sought compensation for or alleged injuries to his interests, and he had not produced any evidence whatsoever from which his damages, if any, could be measured. 306 Or. at 402, 760 P.2d at 860. The court found that, given the statutory scheme, injury to Eckles' and other employers' interests could not be presumed. 306 Or. at 402, n.24, 760 P.2d at 860, n.24. As the court observed, neither Eckles nor any other employer would be liable to injured workers if the transfer caused a shortfall in the Fund. Nor could damages in the form of reduced dividends or premium reductions be assumed, because those benefits are a matter of SAIF's discretion rather than an employer's entitlement. *Ibid.*

Eckles' federal and state "takings" claims, as well as his federal due process argument, failed for the same reason that any claim based on the state's breach of contract failed: Eckles had not alleged or proved damage to his contractual interests. 306 Or. at 403, 760 P.2d at 860-61.

## II. THIS CASE DOES NOT MERIT PLENARY REVIEW.

In his jurisdictional statement, Eckles assumes, without discussion, that section four of the Act (reserving to the state the right legislatively to direct disposition of surplus funds) violates the federal Contract Clause, presumably on the same theory that the state court found it to violate the Oregon

Constitution. Eckles challenges only the Oregon Supreme Court's conclusion that section two of the Act (directing the State Treasurer to transfer money from the Fund) breached rather than impaired his contract with SAIF. He also argues that the Oregon Supreme Court erroneously held that the transfer of money from the Fund was not a taking. Finally, he raises a question that is purely one of state law: whether the state court's proposed remedy for the breach of his contract with SAIF—an action for damages—is available under Oregon law. Eckles never explains the relevance of that question to the federal analysis.

**A. The state court resolved this case consistent with settled federal principles.**

Eckles' arguments are grounded in his belief that the employers insured by SAIF have a fixed, identifiable and vested interest in any surplus in the Industrial Accident Fund. The statutes by their terms belie that assumption, and the Oregon Supreme Court in fact concluded to the contrary. The only benefit that flows to employers when a surplus accrues in the Fund is the possible declaration of a dividend by SAIF, which has the effect of reducing premiums to policyholders. But the declaration and payment of dividends, which is governed by statute, is wholly discretionary. Or. Rev. Stat. § 656.634(2). SAIF, by law, is precluded from promising in advance that a dividend will be declared (*ibid*), thus further reducing any expectation interest employers have in surplus funds. Because a surplus in the Fund at best provides an uncertain benefit to employers insured by SAIF, the Oregon Supreme Court was unwilling to award damages to Eckles in the absence of appropriate pleadings and proof. 306 Or. at 402, n.24, 760 P.2d at 860, n.24.

Although the state court found that section four impaired Eckles' contract with SAIF for purposes of the Oregon Constitution, there should be at least some question whether that

result follows under the federal analysis. Any claim under the federal Contract Clause requires the federal court to decide if there is a contract and, if so, whether the state has passed a law impairing that contract. *St. Paul Gas Light Company v. City of St. Paul*, 181 US 142, 147 (1901).[3] This court has held that "the obligation of a contract within the meaning of the Constitution is a valid subsisting obligation, not a contingent or speculative one." *Ochiltree v. Railroad Co.*, 88 U.S. 249, 252 (1874). Thus, the Court has declined to find an unconstitutional impairment when a law interfers with a benefit that has not vested, but instead is inchoate and undetermined.[4] No employer insured by SAIF, including Eckles, can claim any but the most uncertain and speculative of interests in surplus amounts in the Fund.

Even if section four of the Act impaired Eckles' contract within the meaning of the federal constitution, section two did not. The Oregon Supreme Court's analysis, which draws from early decisions of this Court, tracks precisely with settled federal principles. Eckles criticizes the manner in which the Oregon Supreme Court distinguished between the impairment and the breach of a contract, but the criticism is unwarranted.

This Court's decisions consistently have held that the obligation of a contract should not be confused with its per-

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[3] *See generally, Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Univ.*, ___ U.S. ___, 109 S.Ct. 1248, 57 U.S.L.W. 4295, 4299 (Mar. 6, 1989) (Brennan, J. dissenting) (discussing cases in which Court has held it has an obligation in resolving federal impairment of contract claims to decide, independent of the state courts, whether a contract was made and its terms and conditions).

[4] *See, e.g., Railroad Co. v. Falconer*, 103 U.S. 821, 827 (1880) (town's agreement to subscribe to railroad stock upon the happening of a contingency held too indefinite to trigger protection of the constitution's impairment clause); *Ochiltree v. Railroad Co.*, 88 U.S. at 252-53 (creditor's expectation that future stock would be sold to secure railroad's debts did not entitle creditor to benefit of laws governing stockholder liability at time the stock option arose).

formance. The obligation is considered to be the sum of the rights and liabilities the contract creates, and which the law requires either to be satisfied through performance or through damages that will make the parties whole. *See Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 431 (1934); *St. Paul Gas Light Co. v. St. Paul*, 181 U.S. at 148-49; *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 256-57 (1827). For purposes of the constitutional provision forbidding laws that impair contracts, the distinction is between a statute that violates a previously made contract, leaving the obligation to perform in place, and a statute that eliminates the obligation itself. *Hays v. Port of Seattle*, 251 U.S. 233, 237 (1920). Thus, where a state or municipality passes a law that frustrates the performance of a contract or otherwise causes a contractual duty to go unsatisfied, the obligation of the contract is breached, not impaired. *E.g., St. Paul Gas Light Co. v. St. Paul*, 181 U.S. at 148-49 (ordinance requiring removal of city gas lights and directing that interest not be paid on unused lights frustrated city's contractual duty to pay gas company interest on the construction of each gas light; however, obligation to pay gas company remained unaffected so there was no impairment of contract). The fact that a state or municipality uses its legislative power to accomplish a breach does not transform nonperformance of the contract into an unconstitutional impairment. *Id.* at 149.

Here, under the Oregon court's decision, SAIF's contracts with insured employers during the relevant time period include the promise, made by statute, that the state will not transfer money from the Industrial Accident Fund to the General Fund. Section four of the 1982 Act altered this promise, effectively extinguishing it, by amending the statute to give the state the power legislatively to dispose of excess surplus in the Fund. Section two, on the other hand, simply directed a transfer of the excess surplus in the fund notwithstanding any

law to the contrary. The Oregon Supreme Court concluded, as a matter of state law, that the two sections were severable. Therefore, section two stood alone. In and of itself, it did nothing other than bring about a breach of the promise. The state's obligation not to transfer surplus funds to the General Fund remained in force. Although Eckles finds the distinction the Oregon Supreme Court drew between the legal consequences of the two sections to be "irreconcilable" (Jur. St. at 13), the distinction is in fact sound and well supported.

Eckles next complains that the transfer violated the federal constitution because it resulted in a "taking" of his property without due process or just compensation. (Jur. St. at 16-19). Again, Eckles' argument is built upon the fallacious premise that employers insured by SAIF have a vested, identifiable interest in the Fund. Indeed, he asserts at one point that SAIF policyholders "would have been benefited by that amount [*i.e.*, $81 million plus interest] in the form of dividends or reduced premiums." (Jur. St. at 17). As the statutes make plain, and as the Oregon Supreme Court recognized, policyholders have only a speculative and hopeful interest in excess surplus in the Fund: as a matter of law, the declaration of dividends is wholly within SAIF's discretion and no policyholder may be promised in advance a dividend from surplus in the Fund. 306 Or. at 402, n.24, 760 P.2d 860, n.24; Or. Rev. Stat. § 656.634(2) (1987).

Eckles for the most part ignores that his takings claim was defeated by his own pleadings and procedural choices. Fairly read, his complaint sought a wholesale declaration of the invalidity of the transfer and a return of the full $81 million to the fund. 306 Or. at 382-83, 760 P.2d at 848-49. He did not allege an injury to his own interests, and he did not establish any. He simply did not plead or prove a breach or a taking of his individual property. 306 Or. at 402-03, 760 P.2d at 860. These procedural omissions properly bar consideration of his federal due process and takings claims. *See generally*,

*Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) (failure to present a federal question in conformance with legitimate state procedures bars review by federal court).

Even so, Eckles "takings" argument is without merit. His only interest in the excess surplus in the Fund is contractual in nature. If the state transfers money out of the Fund in violation of its contractual promise, as the Oregon court concluded it did, there is a straightforward breach of the contract. A breach of contract is neither a confiscation of property nor a taking without due process. *Shawnee Sewerage & Dr. Co. v. Stearns*, 220 U.S. 462, 471 (1911). Eckles' ability to attempt to redress his injuries by suing on the contract is sufficient to satisfy due process and to ensure that he receives any compensation due. *Hays v. Port of Seattle*, 251 U.S. at 238. His reliance on the protections of the Due Process and Takings Clauses, therefore, add nothing to the analysis. *Cf. Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969) (applying impairment of contract principles where federal government is alleged to have denied due process by interfering with property in the form of contractual rights and obligations).

Eckles' only answer to these points forms the third and final prong of his argument. Throughout his discussion, he interjects assertions that he has no effective state law remedy for breach of contract because: (1) the statute of limitations ran before the judgment was final in this case; (2) the state is immune from an action on the contract; and (3) damages would be impossible for him to prove. Eckles does not explain the relevancy of these points to his federal claims. But even assuming that these claims have some relevancy, none of them bolster his assertions that his contractual interests were unconstitutionally impaired.

If Eckles' breach of contract action is statutorily time barred, Eckles should not be rewarded for his procedural decision not to pursue such an action earlier. Certainly, given his

theory that a contract existed that was impaired by the 1982 Act, a breach of contract action could have been foreseen. Eckles in fact could have alleged the breach, along with allegations of damages, as part of his complaint in this case. However, for apparently strategic reasons, he declined to do so. *See* 306 Or. at 384, n.6, 760 P.2d at 849, n.6 (noting Eckles' attempts to shift the gravaman of his complaint on appeal for tactical reasons).

Moreover, Eckles declined to file a breach of contract action after the Oregon Supreme Court announced its decision and before its judgment was final (during which time the six-year statute of limitations for contract actions ran). Other employers, however, immediately filed their suits. Those employers are attempting to obtain class certification and, if they succeed, Eckles will be within the class as it is defined.[5]

All of the other matters Eckles raises—*i.e.*, the state's immunity from suit, and whether damages can be proven for this breach—will be resolved by the state courts in the course of the pending lawsuits. Eckles belatedly attempts to present these purely state law questions to this Court, when in fact he has bypassed the procedures by which he could have pursued them in state court. Consideration of them by this Court is unwarranted.

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[5] The pending lawsuits are *Alsea Veneer, Inc. et al. v. State of Oregon, et al.*, Marion County Circuit Court (No. 88-C-11289) and *ABC Roofing et al. v. State of Oregon et al.*, Marion County Circuit Court (No. 88-C-11300). Both are class action lawsuits, filed after the Oregon Supreme Court's decision in this case, in which several named employers insured by SAIF seek damages for the "breach of contract" that the Oregon Supreme Court held occurred when the funds were transferred. The plaintiffs are asking to bring the actions on behalf of all employers with contracts of insurance with SAIF that were in force when the 1982 amendments went into effect. If plaintiffs succeed in having the class certified, Eckles will be a member of the class as defined.

### B. This case does not have any broad significance or importance beyond its particular facts.

This case presents the Court with nothing more than an opportunity to apply the settled distinction between breach of contract and impairment of contract to the particular facts surrounding the 1982 transfer of funds. Even Eckles does not attempt to point to any significant legal principles that would be clarified or pronounced in deciding this case. Instead, he merely quarrels with the Oregon Supreme Court's application of the law to these facts. As demonstrated above, the Oregon Supreme Court's analysis and resolution is sound. Plenary review of the federal questions Eckles presents is not warranted.

Beyond that, ample state remedies were in place for employers to attempt to redress whatever injuries they may have suffered to their contractual interests due to the transfer of funds. Eckles tries to cast this as a circumstance in which millions of dollars properly belonging to private Oregon employers will be lost if this Court does not step in to order a return of the funds transferred. However, as discussed at length above, the policyholders' interests in the transferred surplus funds are far less identifiable and certain than Eckles is willing to admit. Even so, many employers are presently litigating their breach of contract claims in state court, complete with their assertions of damages. Indeed, if class certification is granted, Eckles will be among them, assuming no *res judicata* or other impediment to his participation. Under these circumstances, this Court's jurisdiction and plenary review is not needed to prevent any economic damage to private interests.

## CONCLUSION

For the reasons set forth above, this Court should dismiss or affirm summarily the judgment of the Oregon Supreme Court.

Respectfully submitted,
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# APPENDIX

## CHAPTER 2
## AN ACT [HB 3324]

Relating to the Industrial Accident Fund; creating new provisions; amending ORS 656.526 and 656.634; and declaring an emergency.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1.** (1) The Industrial Accident Fund is a trust fund created and maintained exclusively for the uses and purposes declared in ORS 656.001 to 656.794. The employes and injured workers of Oregon have such rights and interests in the Industrial Accident Fund as are conferred expressly by statute.

(2) Insured employers have no interest in the Industrial Accident Fund, beyond that which they share with the people of the State of Oregon to expect that the Industrial Accident Fund will be operated soundly for the purpose of protecting Oregon employes and injured workers. It is appropriate that the premiums charged insured employers should not significantly exceed the amount necessary to pay claims and the costs of administration and operation of the Industrial Accident Fund and the State Accident Insurance Fund Corporation.

(3) The State Accident Insurance Fund Corporation and the Industrial Accident Fund now possess all reserves necessary under accepted insurance practices to guarantee payment of liabilities of the Industrial Accident Fund, and, in addition thereto, sufficient capital plant and surplus to permit efficient management and operation of the Industrial Accident Fund. The surplus over and above reserves necessary under accepted practices and to permit efficient management and operation of the Industrial Accident Fund, and over and above amounts necessary to protect the interests of employes and

injured workers, substantially exceeds $168 million and State Accident Insurance Fund Corporation officials estimate that the surplus will exceed $200 million by the end of calendar year 1982.

(4) The State Accident Insurance Fund Corporation has the statutory authority to determine the total liability of the Industrial Accident Fund and to set aside reserves deemed actuarially necessary according to recognized insurance principles. Any amounts above reserves are surplus. The State Accident Insurance Fund Corporation has the statutory authority to declare dividends. Because said corporation has no shareholders, such dividends are paid to insured employers and constitute reductions in premiums paid. The State Accident Insurance Fund Corporation is prohibited by law from promising dividends in advance of such declaration. Dividends for calendar years 1981 and 1982 have already been declared and paid. The Legislative Assembly retains authority to modify, amend or repeal the statutes under which the State Accident Insurance Fund Corporation determines liabilities, surplus and dividends.

(5) Most of the excess surplus of $168 million was accumulated in the past three years. The primary reasons for the accumulated surplus are the unusual economic conditions, including extremely high interest rates, which have prevailed during this period, and the significant economic and competitive benefits which accrue to the State Accident Insurance Fund Corporation because of its unique relationship with the public as an instrumentality of the state.

(6) During the period in which most of the excess surplus in the Industrial Accident Fund was accumulated, the workers' compensation rates of the State Accident Insurance Fund Corporation were approved by the Insurance Commissioners, and were not excessively high in relation to claims paid and to the rates of competitors. In fact, the State Accident Insurance Fund Corporation's premium rates could not have been

lowered significantly without reducing rates below the amount necessary to pay current claims and operating costs. Virtually all of the increase in surplus was created by income from and appreciation of investments.

(7) By virtue of its unique relationship to the State of Oregon, the State Accident Insurance Fund Corporation enjoys significant economic and competitive benefits available to no other public or private corporation. Included among those unique benefits are:

(a) Every agency and instrumentality of the State of Oregon is required by law to obtain workers' compensation insurance from the State Accident Insurance Fund Corporation.

(b) The State Accident Insurance Fund Corporation and its officers, employes and agents enjoy the qualified immunity and the limitations on liability conferred by the State Tort Claims Act.

(c) The State Accident Insurance Fund Corporation is entitled to receive the advice of the Attorney General and the legal services of the Department of Justice. Its meetings are subject to the Open Meetings Law and, subject to limited exceptions, its records are public records.

(d) Employes of the State Accident Insurance Fund Corporation participate in the Public Employes' Retirement System.

(e) All moneys in the Industrial Accident Fund are invested by the State Treasurer, in association with the Oregon Investment Council.

(f) The State Accident Insurance Fund Corporation and the Industrial Accident Fund are exempt from all state and federal income taxes. Thus, the corporation and the fund are free to pursue investments which provide the greatest possible return, without regard to the tax consequences of such investments.

(g) Insured employers' financial obligations to the State Accident Insurance Fund Corporation are governed by statute. Insured employers are statutorily bound to make full disclosure to said corporation regarding all information relevant to the risks insured by the fund, and they are obligated by statute to make timely payment of all outstanding obligations. The obligations of the insured employers are enforceable by the State Accident Insurance Fund Corporation by resort to civil and criminal penalties. Moreover, liens accruing to said corporation by virtue of such outstanding obligations have the same scope and priority as liens held by the government for nonpayment of taxes.

(8) As an independent public corporation, it is inappropriate and contrary to public policy for the State Accident Insurance Fund Corporation to continue to maintain a surplus so far exceeding the amount necessary for its statutory purposes.

(9) The State Accident Insurance Fund Corporation is an instrumentality of the State of Oregon, and the state has plenary authority to direct disposition of its excess surplus. The state has authority to direct distribution of all excess surplus for any lawful purpose. The state also has the authority to impose a tax on the State Accident Insurance Fund Corporation. The state has authority to tax the surplus directly, to tax any surplus distributed as dividends to insured employers, or to impose taxes on the State Accident Insurance Fund Corporation upon any rational basis.

(10) The State Accident Insurance Fund Corporation has the demonstrated ability to discharge its statutory trust purposes while contributing its fair share to maintaining the fiscal integrity of the State of Oregon. No other public or private enterprise has the unique advantages and characteristics of the State Accident Insurance Fund Corporation.

(11) After the reduction in excess surplus provided for in this Act, the State Accident Insurance Fund Corporation will

retain more than adequate reserves and surplus for the uses and purposes declared in ORS 656.001 to 656.794.

**SECTION 2.** (1) Notwithstanding any other statute, the State Accident Insurance Fund Corporation shall reduce its excess surplus in the Industrial Accident Fund by the amount of $81 million in the manner provided in this Act.

(2) Notwithstanding ORS 293.115(2)(d), or any other provision of law, the State Treasurer shall transfer $81 million from the Industrial Accident Fund into the General Fund on June 30, 1983. Any liquidation of investments necessary to accomplish this transfer shall be done in an orderly manner and at the most advantageous terms obtainable.

(3) The initiation of a judicial proceeding to challenge the legality of any part of this Act shall not stay implementation of the transfer procedures provided in this section, and no injunction, stay or restraining order prohibiting or delaying such transfer shall issue in such proceeding unless and until the transfer of funds required by this Act has been finally adjudicated to be invalid.

**SECTION 3.** ORS 656.526 is amended to read:

656.526. (1) Periodically, the State Accident Insurance Fund Corporation shall determine the total liability existing against the Industrial Accident Fund.

(2) If, after the determination required by subsection (1) of this section, the State Accident Insurance Fund Corporation finds the Industrial Accident Fund, aside from the reserves deemed actuarially necessary according to recognized insurance principles, contains a surplus, the State Accident Insurance Fund Corporation in its discretion may, **after providing for any payments to the state, taxes or other dispositions of surplus provided by law,** declare a dividend to be paid to, or credited to the accounts of, employers who were insured by the State Accident Insurance Fund Corporation during all or part of the period for which the dividend is declared. Any dividend so declared shall give due considera-

tion to the solvency of the Industrial Accident Fund, not be unfairly discriminatory and not be promised in advance of such declaration.

(3) An employer in default when the dividend is declared shall not be eligible to receive payment or the credit provided by subsection (2) of this section.

(4) Dividends payable to agencies of this state that are supported wholly or in substantial part from General Fund moneys shall be paid into the General Fund and be available for general governmental purposes. Such payments shall include all interest earned on such dividends after the time of their declaration and prior to the time of payment. An agency which has, during the period for which dividends are computed, an administrative budget supported by a General Fund contribution which constitutes less than five percent of its total administrative budget shall not be considered as being supported in substantial part from General Fund moneys for purposes of paying such dividends and interest to the General Fund under this subsection.

(5) For the purposes of subsection (4) of this section, the administrative budget of an agency also includes:

(a) All receipts and expenditures attributable to federal payments.

(b) All receipts and expenditures attributable to higher education construction projects financed under Article XI-F(1) of the Oregon Constitution.

(c) The administrative budgets of all self-supporting divisions, boards and commissions within the agency.

**SECTION 4.** ORS 656.634 is amended to read:

656.634. (1) The Industrial Accident Fund is a trust fund exclusively for the uses and purposes declared in ORS 656.001 to 656.794, except that this provision shall not be deemed to amend or impair the force or effect of any law of this state specifically authorizing the investment of moneys from the fund.

(2) **Subject to the right of the State of Oregon to direct legislatively the disposition of any surplus in excess of reserves and surplus deemed actuarially necessary according to recognized insurance principles, and necessary in addition thereto to assure continued fiscal soundness of the State Accident Insurance Fund Corporation both for current operations and for future capital needs,** the State of Oregon declares that it has no proprietary interest, in the Industrial Accident Fund or in the contributions made to the fund by the state prior to June 4, 1929. The state disclaims any right to reclaim those contributions and waives any right of reclamation it may have had in that fund.

**SECTION 5.** This Act being necessary of the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Approved by the Governor September 9, 1982
Filed in the office of Secretary of State September 10, 1982

**CHAPTER 3**
**AN ACT** **[HB 3325]**

Relating to taxation of independent public corporations created by statute for the purpose of writing workers' compensation insurance.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1.** (1) Notwithstanding any other provision of law, there is hereby levied against each independent public corporation created by statute for the purpose of writing workers' compensation insurance a franchise tax of 44.5 percent of accumulated, declared surplus. The tax shall be for the calendar year ending December 31, 1982, and shall be computed on the basis of unassigned funds (surplus), as reflected in the taxpayers' annual audited financial statement filed with the Insurance Commissioner for the year ending December 31, 1981. The tax shall be paid to the Department of Revenue for credit to the General Fund by no later than June 29, 1983.

(2) Notwithstanding any other provisions of law, no taxpayer shall receive any credit against payment of the tax levied by this section and no other payments shall be offset against the amount owing under this section, except as provided in section 2 of this Act.

**SECTION 2.** (1) The tax imposed by this Act shall not take effect and is not due and payable unless and until enforcement of section 2 of Enrolled House Bill 3324 (chapter 2, Oregon Laws 1982 (third special session)) is enjoined or all or any part of section 2 of Enrolled House Bill 3324 (chapter 2, Oregon Laws 1982 (third special session)) is declared invalid in a final, binding and enforceable judgment of a court of competent jurisdiction. If enforcement of section 2 of Enrolled House Bill 3324 (chapter 2, Oregon Laws 1982 (third special session)) is enjoined or in all or any part of section 2 of Enrolled House Bill 3324 (chapter 2, Oregon Laws 1982 (third

special session)) is declared invalid in a final, binding and enforceable judgment of a court of competent jurisdiction, the tax imposed by this Act shall take effect immediately, but not earlier than 90 days after adjournment of this session of the Legislative Assembly at which this Act is passed.

(2) If enforcement of section 2 of Enrolled House Bill 3324 (chapter 2, Oregon Laws 1982 (third special session)) is enjoined or if all or any part of section 2 of Enrolled House Bill 3324 (chapter 2, Oregon Laws 1982 (third special session)) is declared invalid in a final, binding and enforceable judgment of a court of competent jurisdiction, all moneys transferred to the General Fund, as provided in section 2 of Enrolled House Bill 3324 (chapter 2, Oregon Laws 1982 (third special session)), shall be credited against the tax liability under this Act of the public corporation from whose surplus such funds were transferred.

Approved by the Governor September 9, 1982
Filed in the office of Secretary of State September 10, 1982

A REPLY BRIEF WAS FILED IN THIS CASE ON APRIL 14, 1989, BUT ONLY NINE COPIES WERE PROVIDED TO THE COURT AND AFTER CONSIDERATION BY THE JUSTICES NONE WERE RETURNED TO CLERK'S OFFICE. CONSEQUENTLY NO COPY OF THIS BRIEF WAS AVAILABLE FOR MICROFILMING AT THE TIME THIS CASE WAS ASSEMBLED BY CIS.